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April 8, 1998

Magalie Salas
Secretary,
Federal Communications Commission
1919 Mary Street, NW
Washington, DC 20554

Re: In the Matter of the State of Minnesota, Acting by and Through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253(a),(b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way
CC-Docket No. 98-1

Dear Ms. Salas:

Enclosed for filing is the original and four copies of the Reply Comments of the State of Minnesota to Opposition to Request for Declaratory Judgment and Opposition to Request of the Minnesota Telephone Association, et al. for Preemption. Also enclosed is an Affidavit of Service.

Respectfully submitted,

Scott Wilensky

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Enclosures
cc: Carol Mattey, FCC Common Carrier Policy Division w/enclosure
Janice M. Myles, FCC Common Carrier Bureau w/enclosure
International Transcription Services, Inc. w/enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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	)	
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REPLY COMMENTS OF THE STATE OF MINNESOTA TO OPPOSITION TO REQUEST FOR DECLARATORY JUDGMENT

OPPOSITION TO REQUEST OF THE MINNESOTA TELEPHONE ASSOCIATION, ET AL. FOR PREEMPTION

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REPLY COMMENTS OF THE STATE OF MINNESOTA
TO OPPOSITION TO REQUEST FOR DECLARATORY JUDGMENT

OPPOSITION TO REQUEST OF THE MINNESOTA
TELEPHONE ASSOCIATION, ET AL. FOR PREEMPTION

I. PROCEDURAL HISTORY.

On December 30, 1997, the State of Minnesota, through the Department of Transportation and Department of Administration ("the State") filed a Petition for a Declaratory Ruling that its Agreement with ICS/UCN, a Colorado limited liability company, and Stone & Webster Engineering Corp. is consistent with Sections 253(a), (b) and (c). On January 9, the Commission issued a notice seeking comments on the Petition. Upon the State's filing of the entire contract with the Commission, the Commission issued a notice extending the comment period for one month. On March 9, 1998 the Commission received comments from various interested parties. Many were letters of support from large holders of freeway rights-of-way.

The majority of pages filed were from telecommunications and cable interests, all of whom opposed the Petition. On March 16, 1998, the State filed a motion seeking an extension by which to file reply comments. On March 19, 1998, the Commission extended the Reply Comment period for the State until April 9, 1998.

The State hereby responds to the following comments: Opposition of New York State Telecommunications Association, Inc.; Comments of the Minnesota Cable Communications Association ("MCCA"); Comments of Midwest Wireless Communications, L.L.C. ("Midwest"); Comments of KMC Telecom, Inc. and KMC Telecom II, Inc. ("KMC"); Opposition of the National Telephone Cooperative Association ("NTCA"); Comments of MCI Telecommunications Corporation ("MCI"); Comments of Nextlink Communications, Inc. ("Nextlink"); Comments of Teleport Communications Group, Inc. "(TCG"); Opposition of National Cable Television Association ("NCTA"); Comments of RCN Telecom Service, Inc. ("RCN"); Opposition and Request to Pre-empt of the United States Telephone Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Western Rural Telephone Association and the Competitive Policy Institute ("USTA, et al"); Comments of MFS Technologies, Inc. ("MFS"); Comments of GTE; Comments of the Association for Local Telecommunications Services ("ALTS"); Comments of US WEST, Inc. ("USWC"); Opposition of Ameritech; Comments of SBC Communications, Inc. ("SBC"); comments of GVNW, Inc./Management ("GVNW") and the Opposition of the Minnesota Telephone Association ("MTA"), (collectively referred to as the Telco Opponents.)

II. INTRODUCTION.

The State recognizes that the procedural posture of this matter differs significantly from that of other cases the Commission has decided under Section 253. In the other cases, the Commission has responded to requests to pre-empt state and local laws or requirements. In this matter, the State has stepped forward, seeking a Declaratory Ruling because of threatened legal action by the MTA. Although the State believed the Agreement was in concert with Section 253 of the Telecommunications Act of 1996 ("Telecom Act"), the State needed to clear the cloud

raised by anticipated MTA litigation sooner rather than later. Indeed, as the State anticipated, after filing its' Petition, the MTA, MFS and others have not simply asked the Commission to deny the State's Petition, rather, they have also asked that the Commission pre-empt the State's Agreement with Developer.

This matter calls out for prompt Commission guidance as many other states are considering similar transactions with respect to their freeway rights-of-way. Expedited review of this matter is needed to assure that the State's project and those planned in other states may go forward.

The issues related to freeway rights-of-way are separate and distinct from the many issues regarding municipal rights-of-way. The State has made a clear and sufficient factual record that will allow this Commission to independently analyze the Agreement without concern that it will create precedent for a non-freeway environment as many of the Telco Opponents suggest. This is not a case about how Section 253 need be interpreted with respect to all rights-of-way issues. Rather, it is a unique case, with unique facts that will make it applicable only to freeway rights-of-way. As will be discussed, several pre-Act exclusive freeway rights-of-way arrangements have not led to any complaints by providers nor any adverse impact on competitive entry. The concerns regarding public safety and convenience of the traveling public were paramount in the minds of Congress when it preserved the ability of states and municipalities to manage their rights-of-way. The Congressional history of Section 253(c) is almost exclusively aimed at municipalities and this is because the facts in those situations are very, very different from both a competitive perspective and from a management perspective.

The thirty-year FHWA ban on longitudinal utility placement and the few states that have actually opened their rights-of-way (either exclusively or non-exclusively) are a powerful reminder that limited access highways are the most highly protected assets of the managers of passenger and vehicle transportation.

These transportation managers are not charged with promoting the same interests as the Commission. The Commission is charged with managing telecommunications and information,

transmission through telecommunication networks, broadcast, and wireless means. At this critical juncture between the rights of transportation managers, and the interests of telecommunications and cable interests, the Commission should heed the caution shown by most states and allow for limited physical access to freeway rights-of-way. By doing so, the Commission will facilitate the development of these rights-of-way for telecommunications purposes. If the Commission fails to make a conclusive finding that such an arrangement is permissible, it will leave a cloud on this and many other projects and will compel Minnesota (and other states) either to enter district court litigation to preserve its rights under Section 253(c) or to foreclose these rights-of-way from development.

The State recognizes that the Agreement has drawn the ire of a large number of telecommunications interests that work closely with the Commission on key issues critical to implementation of the Telecommunications Act of 1996. In fact, the Commission rarely finds the traditionally competing interests of IXC's, ILEC's, CLEC's, cable and wireless interests on the same side of an issue. The State Department of Transportation and Department of Administration are unfamiliar voices in the many Commission proceedings arising from implementation of the Telecommunications Act of 1996. Nonetheless, the State has proceeded with diligence and respect for the purposes and goals of the Act. Mindful of the competitive concerns involved with access to rights-of-way, the State negotiated an Agreement which provides sufficient opportunity for telecommunications entities to utilize freeway rights-of-way in a manner that will promote competition and protect the safety and convenience of the traveling public.

III. SUMMARY OF ARGUMENT.

The comments of twenty telephone companies, trade associations, cable companies and others all join strongly in opposing the State of Minnesota's Request for Declaratory Ruling. Only three affidavits were supplied to provide any specific factual analysis regarding the issue

that most deeply concerns the Commission in evaluating whether there has been a violation of Section 253 of the Act: "the practical effect" of the requirement on competition.[1] Most parties make general assertions about adverse consequences which are totally unsupported. Others argue that the State has not met its burden of showing that the public safety and convenience concerns on the freeway rights-of-way are legitimate. Yet not one highway or traffic engineer was called upon to respond to the State's showing. Again, only generalized characterizations of how telecommunications companies would like the world to work are provided. Finally, many of the opposing parties argue that the Agreement which is the subject of this Petition is, per se, illegal. Such arguments rely on misstatements of Commission precedent.

In its Reply, the State will show that the factual assertions it made regarding the impact on the relevant product and geographic were unrebutted. It is this specific factual information upon which the Commission has relied on in its previous decisions under Section 253 of the Telecommunications Act, not mere conclusory assertions. The State also will provide a more detailed analysis of these markets in light of the affidavits submitted by the MTA and MFS. These facts will demonstrate there is sufficient alternative fiber capacity currently installed as well as sufficient alternative rights-of-way which have been and can be effectively utilized to install new fiber capacity. Thus the Agreement does not have the effect of prohibiting entities from offering telecommunications services and is consistent with Section 253(a).

The State will also respond to what it had believed to be a relatively obvious point: freeway rights-of-way are different and unique. Not one of the Telco Opponents is familiar with the problems caused by installing longitudinal utility placements on freeway rights-of-way. They are not responsible for managing these most heavily traveled, highest speed roads and their associated rights-of-way. The Telco Opponents are incredibly cavalier in their dismissal of the public safety and convenience concerns and even more presumptuous as they describe how the

[1] In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park. Memorandum Opinion and Order, CCB Pol. 96-26 (rel. July 17, 1997), FCC 97-251 ("Huntington Park") at para. 27.

State should manage its freeway right-of-way consistent with telephone company interests, rather than the interests of the traveling public and transportation workers.

Additional factual information is presented in these comments to assure the Commission of what the State believed was obvious going in. Freeways are different and the safety and convenience issues involved lead toward different rights-of-way management policies. The Commission must understand that the State is under no obligation to manage freeway rights-of-way to accommodate telecommunications providers. Commissioner of Transportation Denn is the decision-maker on these issues and, like the Commission, he is called upon by the citizens of Minnesota to make appropriate decisions that serve the public interest, not the parochial interests of telecommunications providers. He will attest to his belief that activity on freeway rights-of-way are too integral to the public safety to allow a permit process as advocated by several parties. He will explain that in his judgment, physical access to the rights-of-way must be limited to a single one-time placement via a single construction entity in order to protect the safety and convenience of the traveling public.

The State will explain how its approach is intended to recognize the concerns raised by the opposing parties and why such an approach is a balanced, not extreme, view of how these rights-of-way assets can be utilized. By providing collocation opportunities, the ability to purchase dark fiber and lease fiber capacity at a non-discriminatory rate, the Agreement assures multiple entities will have the ability to install their own facilities or later acquire such capacity.

Finally, the State will address how the use of an RFP process, combined with collocation opportunities, satisfy the competitive neutrality and non-discrimination provisions of Sections 253(b) and (c).

Based on the State's Petition and these Reply Comments, the Commission should find the Agreement to be consistent with Section 253(a), (b) and (c) of the Act. The State, has set forth a series of declarations which will facilitate the ability of this project to go forward.

Lastly, the State will articulate why, even if the Commission does not declare the petition to be consistent with Section 253(a), (b) and (c), it should not preempt the State requirement as

no opponent has provided any credible factual showing that the Agreement will materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.

IV. THE PRACTICAL EFFECT OF THE AGREEMENT IS TO PROMOTE COMPETITIVE ENTRY.

A. The Relevant Product And Geographic Markets Were Conservatively Set Forth By The State In Its Petition.

To determine the practical impact of the Agreement on competition, it is necessary to define the market affected. In its Petition, the State defined the relevant product market as the market for wholesale fiber optic capacity. Most commentors accepted this product market.

A few commentors such as USTA, et al. believe that the services market should encompass markets for services provided over non-fiber facilities since no other facilities can be placed on the freeway rights-of-way after they are developed. See Opposition of USTA, et al., p. 9. To the extent reference is made to copper facilities, this is inappropriate. For the reasons articulated in Exhibit 3 of the Opposition of the MTA, the State would not allow for longitudinal placement of copper facilities. To the extent that USTA, et. al. believe there is a broader market for transmission of voice, video and data, the State concurs. These alternative transmission paths, such as satellite, digital microwave, broadband wireless service, are part of the competitive market for broadband transmission and all comprise alternative supply sources for transmission. Exhibit 4 (Pearce Rebuttal Affidavit). Thus, the State has adopted a conservative approach to the relevant product market. Finally, to the extent that the comments are aimed at a non-fiber based future technology, the Agreement does not preclude the State from taking advantage of this possibility. The Agreement provides exclusive physical access for the installation and maintenance of fiber optic cable only. If a new technology is invented, the Agreement does not prohibit the State from opening the rights-of-way to deploy any such technology. Agreement, Section 11.1(a). The State specifically reserved this right because the future is uncertain and

technological change has been rapid. As such, the only product at issue is fiber transport capacity.

The relevant geographic market has also been properly described as fiber capacity within the State of Minnesota. While USTA, et. al. agrees with this statement of the relevant geographic market,[2] several Telco Opponents (MTA, MFS, KMC and NTCA) indicate that the relevant geographic market is either the freeway right-of-way itself or locations along freeway rights-of-way.

To define the relevant geographic market as the freeway rights-of-way is nothing short of absurd. This presumes there is no other fiber either installed or which can be installed via alternative rights-of-way that can substitute for freeway fiber. As will be described more fully there are multiple substitutes, both in terms of existing capacity and alternative rights-of-way.

The MTA has defined the relevant geographic market as locations along freeway rights-of-way. As Telco Opponents have noted, freeways are often the most direct routes between large population centers. Because fiber tends to connect these population centers, it is easy to demonstrate that there is adequate fiber capacity, even if this subset of the State is utilized for purposes of defining the relevant geographic market.

B. The State's Factual Description Of This Market Remains Unrebutted.

In its Petition, the State described a healthy and robust market for fiber transport facilities whether they are for interexchange or local traffic purposes. No commentor disputed the fact that there is already excess capacity in this market. The telephone companies opposing the project could have stated whether or not there is excess capacity tying these points or whether there are actually capacity constraints. Given that only 15 percent of the State's fiber was lit in (1994 Bureau of Common Carrier Statistics) it is difficult to believe that such excess does not exist on routes following freeway rights-of-way. Instead of providing this information, entities simply engaged in speculation that there may not be adequate fiber capacity.

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[2] Opposition of USTA, et al., at p.9.

However, the existence of this excess capacity has been attested to by the MTA's public representations on this matter. A recent Minnesota Telephone Association (MTA) newsletter quotes the general manager/CEO of MTA member Park Region Mutual Telephone Company as saying:

> There is plenty of capacity that is not used now. And all that's needed to enhance fiber optic cable buried years ago are new lasers.

See Exhibit 6, February 1998, Minnesota Telecommunications update. U S WEST, which comes as close to being as frank about these facts as Telco Opponent is willing to be:

> Minnesota's factual presentation regarding the competitive nature of the market for wholesale intercity fiber transport capacity in Minnesota may also be appealing on first blush, but is ultimately unavailing. Given the extraordinary term of exclusive ROW access granted to the developer (more than 20 years), the Commission's decision must reflect the potential for change in these relevant markets over the life of the Agreement.

Comments of USWC at page 14. The State will separately address the term of the Agreement in Section IV. USWC's argument is an admission that the State has accurately provided the Commission with the market information it needs to conclude that there is adequate fiber transport capacity in the State such that there will be no potential harm to competition.[3]

Since filing its Petition, the State has obtained additional factual information that supports its view that the market is filled with abundant alternative providers of fiber and entities planning to install fiber capacity along alternative rights-of-way. Qwest, which is planning to complete a nationwide deployment of 16,000-plus miles by 1999, plans to construct facilities in Minnesota utilizing railroad rights-of-way. Digital Teleport, Inc. has plans to install fiber in

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[3] Some comments questioned the inconsistency between the State's claim of excess fiber capacity and its desire to bring fiber capacity to more remote areas of Minnesota. There is nothing contradictory about these assertions. Given the enormous capacity of fiber and the lower demand in less populated areas, it is possible to have excess fiber capacity with relatively few providers. The State never argued that there was not fiber capacity in these areas. Rather, it asserted that bringing an additional provider of fiber capacity to this area would promote competition in these rural markets.

Minnesota. Minnesota Power is planning to lease portions of its fiber network through a telephony affiliate. MEANS, owned by 61 members of the MTA, plans to expand its fiber facilities within Northern Minnesota. Dakota Telecommunications plans to deploy fiber in Southwestern Minnesota using state trunk highways. McLeod U.S.A. and IXC have plans to place fiber from the Twin Cities to Moorhead. At the local level, InfoTel has deployed fiber facilities in St. Cloud; and Brainerd; and East Otter Tail has deployed fiber facilities in the Fergus Falls area. Exhibit 3 (Bhimani Rebuttal Affidavit).

These additional existing and planned sources of fiber further demonstrate that there is abundant fiber capacity within the State.

Several opponents, including MTA and MFS, indicate that fiber capacity is location-specific. While not fully explaining the relevance, the State assumes that this is intended to refute the evidence provided that significant excess capacity exists throughout the State. First, it is not necessary to have fiber running from point to point to reach various locations along those points. Routing of installed capacity to connect points which do not have a direct physical connection is an efficient network routing plan. For example, Exhibit 3, Attachment B, which depicts MEANS fiber locations shows that MEANS is capable of routing traffic between St. Cloud and Duluth even though it has no facilities connecting these points. In addition, swap agreements are common place in today's market. Exhibit 3 (Bhimani Rebuttal Affidavit).

The MTA has argued that the State has not met its burden of showing there is adequate capacity. If there are current constraints on the networks for these routes, then the MTA should not be publicly stating that excess capacity exists to meet the State's needs. Moreover, many of the Telco Opponents including the MTA members are in the best position to inform the Commission of areas lacking the excess capacity referred to by the State. Instead, they have reverted to arguing that the State "has not met its burden" of proof when they are in the best position to disprove the State's factual assertions. The Commission can rightfully view this failure as an admission by MTA members, US WEST, and other existing providers such as MCI, MFS, and GTE that such constraints do not exist.

Nonetheless, the State can demonstrate that abundant capacity currently serves locations along the freeway. MEANS, owned by 61 members of the MTA, connects the Twin Cities Metropolitan area with Duluth, St. Cloud, Wadena, Moorhead, Rochester, Owatonna and Windom. Sprint has facilities between the Twin Cities and St. Cloud and Fargo/Moorhead, as well as from the Twin Cities to Owatonna and Worthington. AT&T has fiber facilities connecting the Twin Cities and St. Cloud, Moorhead, Duluth, Owatonna and Worthington; U.S. Link has fiber which connects the Twin Cities, Duluth, Hibbing, Brainerd, Wadena and St. Cloud. MCI has facilities connecting Marshall to the Twin Cities. Exhibit 3 (Bhimani Rebuttal Affidavit). Thus, the Commission can rest assured that locations along the freeway are currently served by significant fiber facilities. This fiber capacity will only expand with the deployment of additional networks within the State.

Current fiber networks connect all of the same locations as the 816 miles of limited access freeway right-of-way within Minnesota. (Exhibit 3 Rebuttal Affidavit). Even if one agrees that fiber is location-specific, this fact changes nothing about the current market and the practical impact on competition described herein and in the Petition.

C. The Developer Will Not Possess Monopoly Or Market Power.

Much of the criticism by the Telco Opponents stems from the mistaken belief that Developer has been granted monopoly status or significant market power. Many of the opponents argue that entities who do not build today will be "forced" to lease facilities from Developer. See e.g. Comments of MCCA; Opposition of NTCA; Comments of Nextlink Communications; and Opposition of NCTA.

Several Telco Opponents refer to the Developer as a monopolist. This bizarre economic statement defies all rational logic regarding economics (there are no substitutes but there is plenty of excess capacity) and it should be summarily dismissed by the Commission.

As was described thoroughly in the State's Petition, other alternative rights-of-way provide viable alternatives to the freeway rights-of-way. Second, existing fiber providers will be

able to expand their capacity at a lower incremental cost compared to installing new fiber. Third, experience in the State of Missouri indicates that exclusive use of freeway rights of way will not prohibit firms from entering the market.

Precisely because of the existence of firms with fiber in place and others continually installing fiber, the Developer does not have and will not gain market power as a result of the Agreement. As stated in its' Petition, the Developer currently has 0 percent of the customers and carries 0 percent of the traffic. The State has provided significant information to demonstrate that Developer does not, will not, and cannot obtain market power by virtue of its grant of physical access to the right-of-way.

The Commission need not focus on whether there truly are alternatives -- there are -- but rather whether the alternatives are sufficient to prevent the Agreement from materially impairing a firm's ability to compete in a fair and balanced legal and regulatory environment. Huntington Park, para. 38. This analysis rests largely on a claim of disparity that is created in the market as a result of the State's requirement to restrict physical access to the freeway rights-of-way to a single construction entity. The evidence regarding alternative routes and cost comparisons shows that the Agreement will not impair effective competition in the relevant markets.

1. Evidence of a material cost advantage does not exist.

Many of the parties simply conclude, without any factual support, that because freeway rights-of-way are the most direct routes between population centers, that Developer will have a tremendous cost advantage.

The discussion of cost advantage must be broken down into a discussion about carriers with existing fiber capacity and new construction. The distinction is important because it demonstrates that there are limited cost advantages in being an entrant in this market, utilizing freeway rights-of-way, and that such advantages are not significant, particularly given the constraints on Developer.

a. Existing providers of fiber can increase capacity at a lower incremental cost than Developer.

As stated in the State's Petition, the cost of providing additional capacity by existing fiber providers is incredibly small. For those with excess capacity, the incremental cost of providing transport is nearly zero. For those who have reached capacity limits, technological upgrades in electronics can usually expand capacity at very low costs. This evidence was provided in the Petition. It is further supported by the statements of MTA representative Hoff, who noted that:

> There is plenty of capacity that is not now used. And all that's needed to enhance fiber optic cable buried years ago are new lasers.

Exhibit 6. A comparison of the cost of placing additional fiber strands compared to achieving the comparable upgrades in band width via electronics upgrades, demonstrates that the electronic upgrades can range from 10 percent to 50 percent of the cost of installing fiber, depending on the number of miles and the amount of capacity. The use of dense wave division multiplexing capability has exponentially increased this capacity expansion opportunity and technology developments will continue to increase the capacity of existing fiber. Exhibit 3 (Bhimani Rebuttal Affidavit). Even if one assumes placement costs are 20-30 percent lower as a result of using freeway rights-of-way, the existing providers still have a significant cost advantage in expanding their current fiber facilities.

b. The cost of installing fiber on freeway rights-of-way in urban areas is comparable to existing placement alternatives.

There is no evidence which indicates that Developer has a significant cost advantage in placing facilities in urban areas. The State has discussed the placement costs of new entrants such as Brooks Fiber and OCI. Representatives of Brooks have indicated that placement costs for its 88-mile ring in the Minneapolis/St. Paul Metropolitan area averaged approximately $100,000 per route mile. Similarly, OCI's 65-mile loop was installed at a cost of roughly $100,000. Developer's construction partner, Stone & Webster, Inc., anticipates costs for its metropolitan fiber ring of approximately $100,000 per mile. The rights-of-way in urban areas require significant directional boring work due to the increased number of interchanges and other obstacles. Metro area freeways are more congested and, as result, more difficult placement

activities are encountered. Exhibit 3 (Bhimani Affidavit). Any telephone engineer who bothered to drive the freeways in the Metro area would easily notice these difficult placement conditions.

Some opponents argue that the costs and delays in obtaining multiple permits from municipalities represents a significant cost advantage. Yet no quantification of this advantage has been noted. In its previous decisions the Commission has concluded that it would not pre-empt state laws without a specific showing of material cost advantages. Huntington Park. Here, the Commission should recognize that many firms such as Wiltel, IXC and Qwest will complete nationwide fiber deployment prior to Developer. Exhibit 4 (Pearce Rebuttal Affidavit). This fear also seems overstated given the experience of firms such as OCI, which completed construction in less than six months. Exhibit 3 (Bhimani Rebuttal Affidavit). The Commission has specific factual evidence to support the notion that placement activity for the Developer are not so significant as to create any material advantage. Thus, there is no readily apparent advantage associated with freeway rights-of-way in urban areas.

c. Placement cost advantages on freeway rights-of-way outside the Metro area are not material.

MTA provided an affidavit of Kenneth Knuth demonstrating that placement costs on State trunk highways rights-of-way on certain routes ranged from 59 percent to 70 percent higher than on freeway rights-of-way. MTA attached a 1996 ITS America report (Opposition of MTA, Exhibit 2) comparing placement costs of freeway rights-of-way with state trunk highways, private property and railroad rights-of-way. This report suggests a cost advantage of 11 to 21 percent. See also Exhibit 3, Attachment A (Bhimani Rebuttal Affidavit). MFS provided an Affidavit of Robert Eide in which he contended that the cost advantage is approximately 30 percent.

It is important to note that the Knuth Affidavit measured only the cost of laying fiber on the state trunk highway compared to the cost of laying fiber on a freeway right-of-way. The total cost of the project and the cost to the Developer are not shown. Based on the cost differentials shown by Mr. Knuth, one can extrapolate savings of roughly $3 million for the 816 miles of

Phase I. This amounts to only 3 percent of total project costs of over $100 million and only five percent of total freeway costs.

Second, the cost savings should be reduced given the higher placement costs and comparability of placement costs in urban areas. The remaining cost savings are related to placement and do not include differences that are likely to exist in placing fiber on the freeway right-of-way versus alternatives. For example, Developer, because it is constructing facilities to serve state needs, is required by contract to pay prevailing wages. See Agreement, Section 9.6. Firms utilizing alternative rights-of-way will not be required to pay prevailing wages and many do not do so. Exhibit 3 (Bhimani Rebuttal Affidavit). Not one party referenced this particular cost burden. It is estimated that this could result in additional total project costs of $10 million. If one applies this increased labor cost to the remaining savings calculated by Knuth, there is no cost advantage. Id.

Finally, there is an acquisition cost and ongoing maintenance cost associated with the Agreement which are not accounted for by Knuth or Eide. Developer, unlike all other entrants, is required to build out in areas of the State, where demand for capacity is not as high as on the more populated routes between population centers. The cost of this investment will be avoided by entities choosing to collocate on the freeway, or place fiber using alternative rights-of-way such as the state trunk highway rights-of-way or railroad rights-of-way on targeted key routes in the State. There is also a one-time cost of $5 million associated with ITS development. Finally, there is the cost of providing capacity and maintenance to the State. When these items are factored in, there is no evidence supporting the notion that Developer will have such a clear cost advantage that would result in materially impairing a competitive market. Exhibit 3 (Bhimani Rebuttal Affidavit).

Finally, the cost burden described here is not of the same magnitude of PUC of Texas. In that case, AT&T estimated that the cost of complying with the build-out requirement would be $5.3 billion. It found that AT&T's cost per switched line sold would be roughly $50 versus $17

for Southwestern Bell. The Commission concluded that this cost differential would effectively prevent AT&T from entering the local market. Id., para. 79.

Here the record supports a cost differential for the freeway routes of $2-$4 million, prior to accounting for labor costs and rights-of-way acquisition costs. The entities utilizing alternative rights-of-way will not incur costs that are significantly different from Developer's. There is no evidence of anything close to a 200 percent cost advantage as found in In the Matter of the Public Utility Commission of Texas, et al., CCB POL 96-13, Memorandum Opinion and Order, FCC 97-346, (Rel. October 1, 1997) ("PUC of Texas") Competitors, including collocators, will not be required to build-out throughout the entire state. Thus, they will compete by targeting high-volume routes where demand is high and their unit cost may be lower than Developer's. Further, existing providers can make additional capacity available at a relatively low incremental cost. The cost differential, to the extent one exists, is not clearly so significant for the Commission to conclude as it did in PUC of Texas that other entities will effectively be prevented from entering the market.

The only factual evidence of cost advantage was provided by MTA and MFS. However, any alleged advantage is not significant and the estimates provided fail to include the various non-placement-related costs faced by Developer. The State has shown that there is no material cost advantage that will lead to all of the concerns raised in the parties' comments regarding materially impairing a fair and balanced legal and regulatory environment such that the requirement has the effect of prohibiting entities from offering telecommunications service.

d. The opportunity to collocate further undermines the notion of a material cost advantage.

Telco Opponents either dismiss collocation as a sham or state that barriers to entry exist for all firms who either cannot time their investment with Developer's or who do not yet exist. (See e.g., Comments of Nextlink; Comments of GTE; Opposition of MTA; and Comments of MFS.)

In spite of the objections, collocation is a real opportunity for competitors to place fiber optic capacity in the freeway rights-of-way. Currently, Developer is negotiating with several entities to collocate fiber. The ability of Developer to share costs with potential collocators is vital to the success of the project. Exhibit 5 (Strock Rebuttal Affidavit).

The ability to collocate along the freeway rights-of-way allows entities to install additional fiber capacity which they will own and use as they desire. Concerns raised about lack of adequate contract protection are discussed in Section IV.F. In terms of creating a fair and balanced legal and regulatory environment, the key is whether Developer has such a significant cost advantage that it will deter others from entering the market. Collocation provides entities with an ability to take advantage of these alleged cost advantages. No collocator is required to install facilities throughout the State but can target its routes to meet its needs. As such, collocation assures that Developer is not the sole entity with cost-effective fiber. No one will be forced to use Developer's network because they can install their own fiber or lease from others who do.

In referring to market power exercised by Developer, the parties ignore collocated fiber as a supply option that will restrain Developer's price (just as they ignore existing capacity). They also argue that since all entities do not have plans to lay fiber today, they are effectively prohibited from offering services. The State via this contract has mandated a three-year construction season for various parts of the State. The open season cannot perfectly match the needs of competitors to time their investment. No markets work this easily for investors and the Commission must understand that implied in all of the comments is a request for a permit process for freeway rights-of-way that simply will not occur.[4] Section 253 was not intended to

[4] See e.g., Comments of KMC (the Commission must preserve the flexibility of providers to take advantage of every opportunity for deployment of new technology); Comments of TCG (the State cannot limit options of carriers); Opposition of USTA et al. (Minnesota should not be permitted to deprive telecommunications service providers the opportunity to place and maintain facilities).

protect every potential entrant from normal market risks, including the risk that at the time the State decided to open its freeway rights-of-way for installation of fiber, once to all comers for a ten-year period, that the entity did not have need for fiber or, as some have suggested, did not yet exist.

RCN suggests that the normal practice in other areas is to install conduit. While conduit would allow for later placement, no entity was willing to pay for the cost of installing conduit. However, entities will, be able to purchase dark fiber to meet future capacity needs pursuant to the Agreement. Moreover, to the extent desired, a collocating entity or entities could request installation of such conduit facilities.

2. Other rights-of-way provide realistic alternative placement opportunities.

Telco Opponents have argued that the freeway rights-of-way are so efficient that Developer will foreclose competition by new entrants. The market itself is providing evidence that this is simply not true. Railroad rights-of-way have been utilized by MCI and Sprint to construct fiber in Minnesota. CPA and UPA have plans to construct fiber facilities along power line rights-of-way in Minnesota. Qwest plans to construct fiber capacity throughout the nation and in Minnesota using railroad rights-of-way. They will do so regardless of the project on routes paralleling the freeway.

Nor can it be argued that these plans are going forward only because no entity believes that the exclusivity will be upheld. In 1994, the State of Missouri granted exclusive access to Digital Teleport, Inc. (DTI) for a statewide backbone of more than 1,300 miles. Principal routes connect the City of St. Louis, Columbia and Jefferson City. See Opposition of MTA, Exhibit 2, Section 2.3. Since that time Wiltel has constructed fiber paralleling the freeway. Qwest is constructing fiber which will parallel the freeway. Brooks placed fiber in St. Louis and Sprint is laying fiber in Jefferson City. None of these entities was deterred by the supposed extraordinary market advantage held by DTI. Exhibit 3 (Bhimani Rebuttal Affidavit). The same is true in Minnesota. Cost-effective alternative rights-of-way exist and are being developed.

The State's freeway rights-of-way should not be viewed as a right-of-way of last resort. Rather, the Commission should distinguish freeway rights-of-way from municipal rights-of-way which are the only routes to provide point-to-point wireline access within most municipalities. The same is not true of the routes connected by freeways. The State has shown that multiple providers are using multiple routes to reach locations along the freeway rights-of-way.

D. The Length of the Exclusivity Does Not Create a 253(a) Violation.

Many of the Telco Opponents, lacking a factual basis to allege a violation of Section 253(a), argue that the ten to twenty-year grant of exclusivity is so long that the Commission cannot predict future events with sufficient clarity as to declare this Agreement consistent with Section 253.

MTA's consultants, Strategic Policy Research indicate that the State has not provided sufficient evidence that alternative facilities exist or may exist in ten years between all of the points served by the interstate highway system in Minnesota. Opposition of MTA, Exhibit 3, p. 6. USWC's main reason for disputing the agreement is that because there is a rapidly changing environment for telecommunications, the 10 to 20-year period of exclusivity encompasses too much uncertainty for the Commission to declare this Agreement consistent with Section 253. Comments of USWC, p.19.

The Telco Opponents have constructed a false legal standard which would, of course, make the Agreement a nullity. The Commission can make reasonable judgments about the reasonableness of a ten-year period based on current information and current trends. The State cannot be held to a burden of proof which is impossible to meet, that somehow it must prove future events. Rather, the State has and can show that there is factual support that concerns regarding the allegations of the uncertain future are simply the last refuge of those without facts on their side.

First, however, it is important for the Commission to understand the Agreement itself and the term in question. The Agreement provides Developer with exclusive physical access for a period of ten years--no more, no less.[5] The Developer has an additional right of first negotiation after that ten year mark. The right of first negotiation may or may not result in an extension, and it may or may not allow for exclusive physical access. However, to the extent that an agreement is reached, the Developer's right to exclusive physical access can only last an additional ten years. Further, any renegotiation agreement must be subject to the same conditions regarding collocation and non-discrimination as the current Agreement. Agreement, Section 11. Thus, to the extent the State decides to open the right of way after ten years, it may:

(1) choose to do so on an exclusive basis with Developer and if it does, require further collocation and continued non-discriminatory rates and prices;

(2) choose to do so on an exclusive basis with a different entity; or

(3) choose to do so on a non-exclusive basis.

The State is not requesting the Commission to declare any future contract to be consistent with 253 of the Act. Rather, the State is requesting that the Commission declare the current contract which has an exclusive term of ten years to be consistent with the Act. Thus, the time period which the Commission should be concerned about is ten years.

Many opponents raised concerns about the ten year period given rapid changes in technology. First, in the event that some non-fiber based technology which could be safely deployed along the freeway right of way is invented, the Agreement does not prohibit deployment of such technology. The State does not realistically believe fiber will be displaced

[5] USTA et al. points to Section 2.70(a) of the Agreement to suggest that exclusivity could last up to 50 years. This term exists to assure the Agreement is not nullified by any common law with respect to the Rule Against Perpetuities and no one can seriously suggest that this dictates the actual period of exclusive physical access.